

NORTH COUNTRY LAND AND DEVELOPMENT CO.

IBLA 98-35 Decided May 3, 1999

Appeal from a decision of the Arizona State Office, Bureau of Land Management, dismissing a protest and denying a demand for a supplemental patent for 80 acres included in mineral patent application No. AZA 23900.

Affirmed.

1. Contests and Protests: Generally—Mining Claims: Patent—Rules of Practice: Protests

The regulations at 43 C.F.R. § 4.450-2 provide that a protest is any objection to any action proposed to be taken in any proceeding before BLM. A protest filed by a mineral patent applicant, based on its belief that its mining claims would be contested, which, in turn, was based on a recommendation included in a draft mineral report prepared by the Forest Service, is properly dismissed on the basis that there is no action proposed to be taken.

2. Mining Claims: Patent

A demand for a supplemental patent for 80 acres of land covered by two placer mining claims, which is based on an inaccurate reading of this Board's decision in United States v. McCormick, 27 IBLA 65 (1976), is properly denied by BLM.

APPEARANCES: W. Scott Donaldson, Esq., Phoenix, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

At issue in this appeal are two placer mining claims, the White Pozzuolan Nos. 1 and 2 (AMC 56876 and AMC 56877), covering a total of 80 acres in sec. 9, T. 23 N., R. 8 E., Gila & Salt River Meridian, approximately 14 miles northeast of the city of Flagstaff, Arizona, in the Coconino National Forest.

In 1968, the land embraced by these two claims was within the boundaries of two placer mining claims, the Oleary Nos. I and II. That same year, Melvin McCormick filed with BLM a mineral patent application seeking a patent for four placer mining claims, the Oleary Nos. I, II, and III, and the Lucky Four. On April 25, 1969, BLM issued a contest complaint on behalf of the U.S. Department of Agriculture, Forest Service, challenging the validity of all four claims.

Following a hearing on that complaint, Administrative Law Judge L.K. Luoma issued a decision on November 23, 1971, declaring the Lucky Four placer claim invalid and the Oleary Nos. I, II, and III placer mining claims valid, with certain exceptions. First, he eliminated the northern 40 acres of the 80 acre Oleary No. III claim as being nonmineral in character. Second, he ruled that, of the remaining 200 acres in the three claims, only 120 acres contained a valuable mineral deposit, and that the other 80 acres were nonmineral in character under the 10-acre rule because the deposit was not marketable in the reasonably foreseeable future. Judge Luoma, however, did not designate the 120 acres containing a valuable mineral deposit. Instead, he allowed McCormick to select the acreage "so long as the total does not exceed 120 acres and the overall configuration remains in reasonably compact form." Finally, he directed that, all else being regular, patent issue for the selected 120 acres. (Decision at 26.)

On December 17, 1971, counsel for McCormick filed a relinquishment of and withdrawal of the mineral patent application for certain lands within the contested claims, including the S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 9 within the Oleary No. I and the N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 9 within the Oleary No. II, totaling 80 acres. ^{1/} On December 27, 1971, the Forest Service filed a timely appeal of Judge Luoma's decision to this Board. McCormick did not appeal. However, while the appeal was pending before the Board, McCormick and his wife located new claims over the relinquished 80 acres. Those new claims each contained 40 acres, the White Pozzuolan No. 1 embracing the N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 9, and the White Pozzuolan No. 2 covering the S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 9.

On September 29, 1976, the Board issued its decision affirming Judge Luoma's decision. United States v. McCormick, 27 IBLA 65 (1976). On December 2, 1976, BLM issued a decision accepting the partial relinquishment and withdrawal filed by counsel for McCormick. On January 10, 1977, BLM issued Patent 02-77-0002 to McCormick for 120 acres.

On May 31, 1989, North Country Land and Development Company (North Country), successor-in-interest to the McCormicks, filed a mineral patent application (AZA 23900) for six mining claims, including the White Pozzuolan Nos. 1 and 2. On June 29, 1992, BLM issued a first half-mineral entry final certificate for the patent application. Thereafter,

^{1/} That relinquishment contained certain descriptive errors relating to lands not at issue in this appeal. Those errors were corrected in a filing made on Jan. 20, 1972.

in February 1997, North Country provided notice that it was withdrawing all claims from the patent application, except the White Pozzuolan Nos. 1 and 2. On February 27, 1997, BLM issued a decision recognizing the withdrawal and canceling the first half-mineral entry final certificate in part to reflect the withdrawal.

On June 2, 1997, North Country filed its protest and demand (Protest/ Demand) for patent with BLM. North Country based its protest on the fact that, pursuant to the Freedom of Information Act (FOIA), it had obtained a copy of a draft mineral report by the Forest Service relating to AZA 23900 in which a contest of the claims had been recommended. Although the draft mineral report had not been formally reviewed by BLM, North Country took the position that it could protest what it considered to be the proposed action of initiation of a contest against the claims.

North Country also demanded that a "supplemental" patent be issued for the 80 acres covered by the White Pozzuolan Nos. 1 and 2. The basis for its demand was its interpretation of this Board's decision in United States v. McCormick, supra. BLM dismissed the protest and denied the demand for a supplemental patent. North Country filed a timely appeal.

[1] For the reasons stated below, we affirm BLM's decision. We turn first to North Country's protest. The regulations at 43 C.F.R. § 4.450-2 provide that a protest is any objection to any action proposed to be taken in any proceeding before BLM. North Country asserts in its statement of reasons for appeal (SOR) at 5 that "[t]he action proposed by BLM is to contest the mining claims included in AZA 23900."

The Forest Service's draft mineral report on AZA 23900 had not undergone technical review by BLM, a fact admitted by North Country in its protest. In fact, according to BLM's decision, the Department of the Interior would not have released such a document under the FOIA because

[p]ursuant to the authority delegated to the BLM by the Secretary of the Interior in Reorganization Plan No. 3 of 1946 (60 Stat. 1099), Reorganization Plan No. 3 of 1950 (64 Stat. 1262), and Departmental Directives at 235 DM [Departmental Manual] 1.1A and 135 DM 1.3B, until technical review is completed a mineral report is a predecisional document.

Clearly, absent technical review and some final determination by the Forest Service to pursue a contest, there was no "action proposed to be taken" within the meaning of 43 C.F.R. § 4.450-2. BLM properly dismissed the protest.

[2] The basis for North Country's demand and its appeal is the following language from Administrative Judge Stuebing's opinion in United States v. McCormick, 27 IBLA at 87:

Since in this case it has been demonstrated that the produce of all three Oleary claims will be reasonably required to supply the anticipated market over the next 30 years, all three claims should have been held to be valid to the extent that they are mineral in character. 1/

1/ The contestees did not appeal from this decision. Acting in accordance therewith on December 20, 1971, they filed with the Bureau of Land Management a relinquishment of all rights to the Lucky Four claim and portions of the Oleary Nos. I, II, and III. Although neither of my colleagues on the panel agree, it is my view that the filing of the appeal by the Forest Service stayed the effect of Judge Luoma's decision and the need for compliance therewith during the pendency of the appeal, and that this Board, having authority to review the case *de novo*, can and should correct any error which it detects in the decision below. Chief Judge Frishberg believes that once the subject 80 acres were relinquished, for whatever reason, those parts of the claims no longer existed, as a relinquishment is operative *eo instanti* when filed, so that there was nothing left which could be considered the subject of an appeal. Accordingly, he regards the issue as moot, and he does not subscribe to this portion of the discussion. Judge Ritvo's view is set out in his separate opinion.

In its Protest/Demand at page 2, North Country stated:

The IBLA decision addressed the issue that the appeal by the Forest Service stayed the relinquishment and withdrawal by the applicant until IBLA's decision was rendered. It also discussed the principle that IBLA was empowered to overrule the administrative law judge, which it did as to the application of the excess reserves rule.

While it is true that the Board's opinion in McCormick "addressed the issue" and "discussed the principle," it offered no controlling precedent with regard to the 80 acres presently in question. Administrative Judge Stuebing, with the concurrence of Chief Administrative Judge Frishberg, affirmed Judge Luoma's decision approving patent for 120 acres, without modification. Administrative Judge Ritvo dissented, offering his opinion that the record did not support issuance of a patent for any of the land. The language relied on by North Country is that of Judge Stuebing alone and does not constitute controlling precedent by this Board. In fact, the position of Chief Administrative Judge Frishberg that a relinquishment is effective *eo instanti* seems clearly to be the better rule. Nevertheless, we need not decide that issue in this case.

North Country argues that in light of the McCormick decision the doctrine of administrative finality precludes a contest of the White Pozzuolan

Nos. 1 and 2 claims. However, there is no ruling in McCormick on which to base a claim for the application of that doctrine. 2/

BLM properly stated in its decision at 3 that "[t]he current Mineral Patent Application (AZA-23900) will stand on its own merits, and appropriate disposition of the case will be made following the proper procedures."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

2/ North Country asserts that "Forest Service could have appealed the prior U.S. v. McCormick IBLA decision into federal court. It failed to do so. The decision has become final and binding on the parties." (SOR at 8.) The decision in McCormick only addressed the 120 acres subsequently patented to McCormick. There is no binding precedent from McCormick that is controlling as to the lands presently at issue. Moreover, North Country is off the mark when it asserts that the Forest Service could have appealed the McCormick decision to Federal court. A decision of the Board of Land Appeals is final for the Department. 43 C.F.R. § 4.21(d). While a private party, who is adversely affected by such a decision, may seek judicial review, a Federal agency, in a similar posture, may not.

